Abdul Razak bin Anwar Batcha & Anor v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO WA-42K-9 & 10–11 OF 2022
MUNIANDY KANNYAPPAN J
21 SEPTEMBER 2024

Criminal Procedure — Revision — Application — Discharge not amounting to acquittal ('DNAA') — Whether order of DNAA by sessions court appropriate — Whether investigation incomplete — Whether inappropriate for prosecution to prefer charge and investigate later — Whether sessions court ought to have ordered discharge amounting to acquittal ('DAA') — Whether court should exercise revisionary jurisdiction pursuant to s 323(1) of the Criminal Procedure Code

Both the accused persons were charged for an offence of cheating at the sessions court pursuant to s 420 of the Penal Code ('the PC') in furtherance of common intention of both of them, as mode of their participation in the crime pursuant to s 34 of the PC. Before the trial commenced, the prosecution decided to withdraw the charge brought against both accused as further investigation had to be embarked on another related matter which had a bearing on the offence alleged against them. Ensuing from that, the deputy public prosecutor ('DPP') informed the sessions court judge ('SCJ') that the charges be withdrawn and instantly applied for both the accused persons to be only discharged and not acquitted ('DNAA').Accordingly, the SCJ granted an order of DNAA pursuant to s 254(3) of the Criminal Procedure Code ('the CPC'). An order of DNAA was not appealable pursuant to s 3 of the Courts of Judicature Act 1964. Therefore, counsel representing the accused persons invited this court to exercise its revisionary jurisdiction, pursuant to s 323(1) of the CPC, by contending that the order of DNAA made by the SCJ was improper. Specifically, it was argued that since the investigation was incomplete, the accused persons ought not to have been charged for the offence of cheating in the first place, as it was inappropriate for the prosecution to prefer a charge and investigate later.

Held, affirming the order of DNAA:

(1) It was imperative if an accused applied to the court for an order of DAA, upon withdrawal of a charge against him by the prosecution, the court was still in a position to order so if the circumstance of the case warranted it, but otherwise the order of the court shall be a DNAA. For the court to exercise its judicial discretion to make an order of DAA, there had to be a clear circumstance justifying it (see para 13).

(2) The SCJ was correct to have ordered DNAA instead of DAA, not only in the light of the default position under s 254(3) of the CPC, but also in light of the prosecutorial discretion of the PP to institute criminal prosecution pursuant to art 145(3) of the FC. Thus, the order of DNAA made was proper, taking into consideration the facts and circumstance of the case as revealed to the SCJ, wherein the pivotal consideration being, trial of the case of the accused persons has not commenced as witnesses had not taken their stand in the witness box to testify (see paras 18–19).

(3) A criminal case did not turn out to be groundless, just because investigation was still ongoing, as it was an accepted norm for investigation of the case involving the accused could still be pursued, after having preferred a charge on him, and it did not render the charge against him to be groundless unless it lacked foundation in law or in effect it was destitute. Even then, the court was only entitled to discharge the accused person and not to acquit him pursuant to s 173 (g) of the CPC, as the law recognized the fact that the accused could only be acquitted when the case for the prosecution was completed and left to the court for determination (see para 20).

(4) The SCJ when ordering a DNAA had considered all factors raised appropriately. The order of DNAA made was proper in the circumstance of the case and the basis rendered by the SCJ was well founded. The application by the accused persons to have the order of DNAA made by the SCJ revised as it was allegedly improper was dismissed (see paras 26–27).

[Bahasa Malaysia summary

Kedua-dua tertuduh telah dituduh atas satu kesalahan menipu di mahkamah sesyen menurut s 420 Kanun Keseksaan ('KK') bagi mencapai niat bersama kedua-dua mereka, sebagai kaedah penglibatan mereka dalam jenayah menurut s 34 KK. Sebelum perbicaraan bermula, pendakwaan telah memutuskan untuk menarik balik pertuduhan yang dikenakan terhadap kedua-dua tertuduh kerana siasatan lanjut perlu dijalankan berhubung dengan perkara lain yang berkaitan yang mempunyai kesan terhadap kesalahan yang didakwa terhadap mereka. Berikutan daripada itu, timbalan pendakwa raya ('TPR') telah memaklumkan kepada hakim mahkamah sesyen ('HMS') bahawa pertuduhan hendaklah ditarik balik dan serta-merta memohon agar kedua-dua tertuduh hanya dilepaskan dan tidak dibebaskan ('DNAA'). Sehubungan itu, HMS telah memberikan suatu perintah DNAA menurut s 254(3) Kanun Tatacara Jenayah ('KTJ'). Suatu perintah DNAA tidak boleh dirayu menurut s 3 Akta Mahkamah Kehakiman 1964. Oleh itu, peguam yang mewakili kedua-dua tertuduh telah memohon mahkamah ini untuk melaksanakan bidang kuasa semakan, menurut s 323(1) KTJ, dengan menghujahkan bahawa perintah DNAA yang dibuat oleh HMS adalah tidak wajar. Secara khususnya, ianya dihujahkan bahawa memandangkan siasatan

belum selesai, kedua-dua tertuduh sepatutnya tidak didakwa atas kesalahan menipu pada asalnya, kerana ia adalah tidak wajar bagi pendakwaan untuk mengemukakan pertuduhan dahulu dan menyiasat kemudian.

Diputuskan, mengesahkan perintah DNAA:

(1) Ia adalah penting bahawa sekiranya seorang tertuduh memohon kepada mahkamah bagi suatu perintah DAA, setelah penarikan balik sesuatu pertuduhan terhadapnya oleh pendakwaan, mahkamah masih berada dalam kedudukan untuk membuat perintah sedemikian jika keadaan kes menuntutnya, tetapi sebaliknya perintah mahkamah hendaklah berupa DNAA. Untuk mahkamah melaksanakan budi bicara kehakiman bagi membuat suatu perintah DAA, mestilah terdapat keadaan yang jelas yang mewajarkannya (lihat perenggan 13).

(2) HMS adalah betul untuk memerintahkan DNAA dan bukannya DAA, bukan sahaja berdasarkan kedudukan asal di bawah s 254(3) KTJ, tetapi juga berdasarkan budi bicara pendakwaan oleh PP untuk memulakan pendakwaan jenayah menurut perkara 145(3) PP. Oleh itu, perintah DNAA yang dibuat adalah wajar, mengambil kira fakta dan keadaan kes sebagaimana dimaklumkan kepada HMS, di mana pertimbangan utama adalah bahawa perbicaraan kes terhadap tertuduh belum bermula kerana saksi-saksi belum memberikan keterangan dari kandang saksi (lihat perenggan 18–19).

(3) Sesuatu kes jenayah tidak menjadi tidak berasas hanya kerana siasatan masih berjalan, kerana adalah suatu norma yang diterima bahawa siasatan berhubung kes yang melibatkan tertuduh boleh terus dijalankan selepas pertuduhan dikemukakan terhadapnya, dan perkara itu tidak menjadikan pertuduhan tersebut tidak berasas melainkan ianya tidak mempunyai asas di sisi undang-undang atau pada hakikatnya adalah kosong. Walaupun begitu, mahkamah hanya berhak untuk melepaskan tertuduh dan bukan membebaskannya menurut s 173(g) KTJ, kerana undang-undang mengiktiraf bahawa seseorang tertuduh hanya boleh dibebaskan apabila kes pendakwaan telah selesai dan diserahkan kepada mahkamah untuk diputuskan (lihat perenggan 20).

(4) HMS ketika memerintahkan DNAA telah mengambil kira semua faktor yang dibangkitkan dengan sewajarnya. Perintah DNAA yang dibuat adalah wajar dalam keadaan kes tersebut dan alasan yang diberikan oleh HMS adalah berasas. Permohonan oleh tertuduh untuk menyemak semula perintah DNAA yang dibuat oleh HMS atas alasan ianya dikatakan tidak wajar telah ditolak (lihat perenggan 26–27).]

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 321, CA (refd)
Goh Oon Keow (F) and another v Rex [1949] 1 MLJ 35; [1948] 1 MLRH 258 (refd)
K Abdul Rasheed v PP; Ah Chak Arnold v PP [1985] 1 MLJ 193; [1985] 2 MLRH 410 (refd)
Koh Teck Chai v PP [1968] 1 MLJ 166 (refd)
Kuppusamy v PP [1948] 1 MLJ 25 (refd)
Ng Yiu Kwok and Ors v PP [1989] 3 MLJ 166, SC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Lee Chan Sang [1989] 1 MLJ 224, SC (refd)
PP v Mohamed Said [1984] 1 MLJ 50 (refd)
PP v Nasir bin Insiban [1996] 5 MLJ 153, HC (refd)
PP v Suppiah Pather (Penang Criminal Revision No 14 of 1951) (unreported) (refd)
PP v Zainuddin & Anor [1986] 2 MLJ 100, SC (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129, CA (refd)
Savrimuthu v PP [1987] 2 MLJ 173, SC (refd)
Seet Ah Ann v PP [1950] 1 MLJ 293b; [1950] 1 MLRH 138 (refd)
Tan Hoo Eng v PP [2019] 6 MLJ 471, CA (refd)
Vigny Alfred Raj a/l Vicetor Amratha Raja v PP [2022] 5 MLJ 639; [2024] 6 MLRA 1, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 3
Criminal Procedure Code ss 173(f)(ii), (g), 254, 254(1), (2), (3), 254A, 302(1), (5), 323(1), 399, 402A
Evidence Act 1950 s 90A(2)
Federal Constitution arts 7, 145(3)
Penal Code ss 34, 420
Criminal Procedure Code [SG] s 184(2)

Preakas Sampunathan (with Navinderan Subramaniam and Komal Vijay Seth) (Preakas & Partners) for the appellants.
Nur Aqilah Ishak (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Muniandy Kannyappan J:

[1] The facts reveal, both accused persons (appellants to the present appeal) were charged for an offence of cheating at the sessions court pursuant to s 420 of the Penal Code ('the PC/Act 574') in furtherance of common intention of both of them, as mode of their participation in the crime pursuant to s 34 of the PC.

[2] Before trial commenced, the prosecution had decided to withdraw the charge brought against both of them. It is their constitutional prerogative to do so pursuant to art 145(3) of the Federal Constitution ('the FC'). They had taken the position to discontinue the criminal prosecution, as further investigation has to be embarked on another related matter which has a bearing on the offence alleged against them.

[3] Ensuing from that, the deputy public prosecutor ('DPP') appearing for the prosecution had informed the sessions court judge ('SCJ') that the charges be withdrawn and instantly applied for both the accused persons to be only discharged and not acquitted. The order sought from the court, is commonly referred to as DNAA — discharge not amounting to an acquittal. To reiterate, such an order was sought as the prosecution wishes to have the criminal prosecution discontinued as further investigation has to be carried out on a related matter which has a bearing on the charge preferred against both the accused persons. Thus, if the impending investigation turns out fruitful, criminal prosecution may still be pursued, but if otherwise it would not be.

[4] By virtue of that, the SCJ had agreed with the prosecution and decided to grant an order of DNAA pursuant to s 254(3) of the Criminal Procedure Code ('the CPC/Act 574') which renders the following:

> Such discharge shall not amount to an acquittal unless the Court so directs.

[5] It is the discretion of the SCJ to grant such an order as the default position under s 254(3) of the CPC is for her to grant an order of DNAA upon withdrawal of the charge against an accused person pursuant to s 254(2) of the CPC.

[6] Such a position is also in tandem with the law, as the earliest stage at which an accused person could be acquitted of the charge, commonly referred to as an order of DAA — discharge amounting to an acquittal, is when the court at the end of the case of prosecution pursuant to s 173(f)(ii) of the CPC, finds that the prosecution was unable to make out a prima facie case against the accused. In that respect, see the case of *Kuppusamy v Public Prosecutor* [1948] 1 MLJ 25, as well as the legal provision in s 173(f)(ii) of the CPC which reads as:

> If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of *acquittal*. (Emphasis added.)

[7] Unlike the above, an order of DNAA could be made pursuant to s 173(g) of the CPC, when the charge preferred against the accused turns out groundless, lacking in its foundation, thus unsustainable if it proceeds for trial. Instances, inter alia, would be if the charge preferred is for an offence unknown

in law or for a non-existing offence as the offending provision had been repealed, or there has been decriminalisation of the conduct or actus reus in issue. The stage at which the court may order so, is when the case for the prosecution has not come to an end yet, as reflected in that provision itself, which reads:

> Nothing in paragraph (f) *(which is at the end of the case of prosecution)* shall be deemed to prevent the Court from *discharging* the accused at any previous stage of the case *(before completion of the case of prosecution)* if for reasons it be recorded by the Court it considers the charge to be groundless. (Emphasis added.)

[8] Due to lack of research by both parties to this proceeding, this matter has reached the High Court when an order of DNAA made by the sessions court is not a final order disposing of the rights of parties, since the public prosecutor ('PP') may choose to institute prosecution of the accused persons later in time, pursuant to the same art 145(3) of the FC. It turned out to be a fact, as the accused persons, as I am informed, were later charged at the magistrate's court, presumably on completion of the further investigation. It is exactly this situation which renders an order of DNAA not to be appealable pursuant to s 3 of the Courts of Judicature Act 1964 ('Act 91'), which provides that a decision means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any course or matter which does not finally dispose of the rights of the parties (see also *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129; *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321).

[9] However, this court was invited by counsel representing the accused persons to exercise its revisionary jurisdiction, pursuant to s 323(1) of the CPC, by contending that the order of DNAA made by the SCJ was improper in view of the circumstances of the case before her. Specifically, it was argued that since investigation is incomplete, the accused persons ought not to have been charged for the offence of cheating in the first place, as it is inappropriate for the prosecution to prefer a charge and investigate later. Moreover, it is the belief of the accused persons via their able counsel that with the revisionary and/or supervisory jurisdiction of this court, swift justice would yield to accused persons, as it is in a position to correct the improper order of DNAA handed down by the SCJ, which had allegedly occasioned miscarriage of justice to the accused persons. Such would not be the parameters of an appeal which would take a longer time to be processed, heard and determined by the High Court, as it is constrained by its inundating process, which includes the filing of a notice of appeal, petition of appeal, service of it on the respondent, awaiting receipt of the grounds of judgment by the SCJ, before it is finally set down for hearing and disposal. In any event, I pursued with the application for revision on the premise that the order of DNAA made by the SCJ was improper pursuant to s 323(1) of the CPC. For the record, there is available grounds of

judgment by the SCJ, containing basis and reasons as to why she had granted an order of DNAA.

[10] In the course of proceeding, reference was made to the decision by our apex court in the case of *Vigny Alfred Raj a/l Vicetor Amratha Raja v Public Prosecutor* [2022] 5 MLJ 639; [2024] 6 MLRA 1, in particular the minority judgment, which, inter alia, had decided that the default position under s 254(3) of the CPC has to be an acquittal and not a discharge only. Also, that criminal investigation shall not be pursued after an accused had been charged in court for a criminal offence, as he cannot be charged and investigated by an enforcement agency subsequently. Basically, it echoes that only when the investigation of the crime is complete, prosecution of the accused could be pursued in court, by preferring a charge against him.

[11] However, to the contrary, the majority judgment in that case decides otherwise, wherein Her Ladyship Zabariah Mohd Yusof FCJ had decided, inter alia, on the following terms:

> Essentially the appeal deals with the issue of when should an order for DAA under s 254 of the CPC be granted.
>
> Agree with the ultimate decision that the facts in this case warranted a direction for DAA.
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> Section 254(2) of the CPC provides that at any stage of any trial before a sessions court (as in the present case) before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the court and, if so stayed, the accused shall be discharged of and from the same.
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> Section 254(3) of the CPC provides such discharge shall not amount to an acquittal unless the court so directs.
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> On the interpretation of s 254(3) of the CPC, a plain and literal reading of the provision means *that any discharge granted by the court under s 254, is a DNAA.* But for a DAA, it must be specifically directed by the court.
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> Advice is for the court to give effect to the plain and literal meaning especially so when the wordings of the statutory words is plain and unambiguous, and if so, it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. Support sought from the decision of Suffian LP in the case of *Public Prosecutor v Sihabduin bin Hj Salleh & Anor* [1980] 2 MLJ 273; [1980] 1 MLRA 3.

[12] Thus, the majority judgment had prevailed in that case of the apex court, rejecting the notion that the default position under s 254(3) of the CPC is for the court to grant an order of DAA and the court has to specifically direct

an order of DNAA. Her Ladyship Zabariah Mohd Yusof FCJ had also succinctly decided the following:

> [92] I have read and examined the authorities and cases referred to, in the judgment and found that, they never ruled on the interpretation to be accorded to s 254(3) of the CPC to the effect that 'the court has to specifically direct that the discharge does not amount to an acquittal. Otherwise, the default position is that the discharge amounts to an acquittal'. In my view, what those cases held were, the court is vested with the discretionary power to direct an acquittal of an accused person (DAA) pursuant to s 254(3) of the CPC and that such discretion is to be exercised judiciously. In other words, s 254(3) of the CPC does not fetter the discretion of the court in directing that the discharge to amount to an acquittal, if circumstances warrant it. The following cases support this proposition:
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> *Public Prosecutor v Ambika a/p MA Shanmugam* [2021] 2 MLJ 723; [2021] 1 MLRA 596 ; *Mohamed bin Kanathi Meerah Mydin v Public Prosecutor* [2019] 2 MLJ 194; [2019] 2 MLRA 574; *Goh Cheng Chuan v Public Prosecutor* [1990] 3 MLJ 401; [1990] 5 MLRH 557; *Tan Ah Chan v Regina* [1955] 1 MLJ 218; [1955] 1 MLRH 449; *Seet Ah Ann v Public Prosecutor* [1950] 1 MLJ 293b; [1950] 1 MLRH 138; *Goh Oon Keow (F) and another v Rex* [1949] 1 MLJ 35; [1948] 1 MLRH 258.

[13] Flowing from the above, it is imperative if an accused applies to the court for an order of DAA, upon withdrawal of a charge against him by the prosecution, the court is still in a position to order so if the circumstance of the case warrants it, but otherwise the order of the court shall be a DNAA. For the court to exercise its judicial discretion to make an order of DAA, there has to be a clear circumstance justifying it.

[14] Reference is made to the decision by Justice Lai Kew Chai in the case of *K Abdul Rasheed v Public Prosecutor; Ah Chak Arnold v Public Prosecutor* [1985] 1 MLJ 193; [1985] 2 MLRH 410, where it was decided, the court in exercising its power under s 184(2) of the Singapore CPC (in pari materia with s 254(3) of our CPC) has to be always mindful of the right of the prosecution to proceed at a later stage against the accused, which is consonant with the prosecutorial discretion of the PP pursuant to art 145(3) of our supreme law to institute criminal proceeding against an accused person. Essentially, in that judgment, the parameters were set that it is not desirable to lay any hard and fast principle which the court must follow, as if it is cast on stone, thus fettering its judicial discretion. Circumstance of a case varies, and each of it has to be dealt with on its merits, with the court having to be mindful not only of public interest but also right of an accused who would be left saddled with a charge, if the criminal proceeding is stayed for an indefinite period. Having considered that clear proposition of the law, Her Ladyship Zabariah FCJ had also decided that the court has the discretion/power/jurisdiction to order a DAA to an accused if the facts warrant it under s 254 of the CPC.

[15] Pause to add that in the case of *Vigney Alfred Raj,* at the outset when the DPP applied for an order of DNAA had informed the trial court that on examination of the charge against the accused, the prosecution had decided not to continue with the prosecution as investigation of the crime was still ongoing. Thus, an order of DNAA was sought. But before commencement of hearing of the appeal at the Federal Court, this time the DPP had informed the court that investigation of the crime allegedly committed by the accused was completed and the PP had *decided not to proceed* any further with the charge against him and left it to the wisdom of apex court to decide on the issue. It was solely on that premise, an order of DAA was favored.

[16] In the present case, counsel for accused persons had contended, as the charges preferred dates back to an offence committed in the year 2012, investigation ought to have been completed before the charge was preferred. However, it is stark, unlike a civil case, there is no time frame prescribed in law to pursue criminal prosecution, as long as the exercise of prosecutorial discretion by the PP does not impinge on art 7 of the FC. It is not so in the present case, as the charge preferred was for an offence of cheating which has been criminalised since time immemorial (see decision of the Court of Appeal in the case of *Tan Hoo Eng v Public Prosecutor* [2019] 6 MLJ 471).

[17] As criminal prosecution is at the behest of the PP, he has to be mindful of the fact that testimonial evidence of witnesses for the prosecution would date back to facts and events which had happened eons ago. Unparalleled is the right of the accused persons to cross-examine the said witnesses to challenge the credibility of their testimonial evidence and consequently reliability of their evidence as proof in the case against them. That right which is sacrosanct stays.

[18] Back to the issue at hand, the SCJ was correct to have ordered DNAA instead of DAA, not only in the light of the default position under s 254(3) of the CPC, but also in light of the prosecutorial discretion of the PP to institute criminal prosecution pursuant to art 145(3) of the FC. It is also on the same premise, s 254A of the CPC stands justified. It reads:

> (1) Subject to subsection (2), where an accused has been given a discharge by the court and he is recharged for the same offence, his trial shall be reinstated and be continued as if there had been no such order given.
>
> (2) Subsection (1) shall only apply where witnesses have been called to give evidence at the trial before the order for discharge has been given by the court.

[19] Thus, the order of DNAA made is proper, taking into consideration the facts and circumstance of the case as revealed to the SCJ, wherein the pivotal consideration being, trial of the case of the accused persons has not commenced

as witnesses have not taken their stand in the witness box to testify (see the case of *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173).

[20] Reliance by counsel for the accused persons on the minority judgment in the case of *Vigney Alfred Raj,* that there cannot be a charge preferred and investigate later, as to do so would be an aberration and travesty of justice. Further, that an order of DNAA sought by the prosecution pursuant to s 254(3) of the CPC borders on abuse of power and oppression on the accused persons which cannot be endorsed by the court. In effect, had this been a summary trial (in the present case it is one) it would have shown that the prosecution had a groundless case and the accused must be acquitted and discharged. As comment, a criminal case does not turn out to be groundless, just because investigation is still ongoing, as it is an accepted norm for investigation of the case involving the accused could still be pursued, after having preferred a charge on him, and it does not render the charge against him to be groundless unless it lacks foundation in law or in effect it is destitute for instances as discussed above. Even then, the court is only entitled to discharge the accused person and not to acquit him pursuant to s 173(g) of the CPC, as the law recognises the fact that the accused could only be acquitted when the case for the prosecution is completed and left to the court for determination.

[21] On the contention that the investigation phase of the case was over when the accused persons had been charged for a criminal offence in court, is but a clueless stand taken. Criminal investigation involving an accused is ongoing even after the charge has been preferred for a myriad of reasons, which, inter alia, would include the following instances:

(a) for an investigation officer ('IO') of the case to trace witnesses in order to be called to testify for and on behalf of the prosecution;

(b) by virtue of further development in the case prosecuted, issues may have been raised by witnesses testifying, necessitating further investigation;

(c) even when the accused has raised issues pertinent to his case which has to be investigated before the PP considers to either proceed with the charge against him or to have it withdrawn. This was exactly the position in the case of *Vigney Alfred Raj,* which had turned out beneficial to him;

(d) another example would be if a defence of alibi is raised by an accused pursuant to s 402A of the CPC, which has to be investigated, and with further investigation, there is probability for the charge against him to be withdrawn if the alibi turns out to be with basis, rendering it repugnant to the charge preferred against him;

(e) further investigation after charge is also endeavored in the case of service of an expert report as envisaged under s 399 of the CPC, if a notice to cross-examine the said expert is given by the accused. The investigation

officer has to ensure the expert is present in court in order to be cross-examined; A

(f) so is also the situation when a certificate as envisaged under s 90A(2) of the Evidence Act 1950 ('the EA/Act 56') has to be tendered upon production of digital evidence as proof in the case against an accused; and B

(g) for the purpose of procuring evidence in rebuttal upon the accused tendering evidence repugnant to the case of the prosecution, which had stood unforeseeable by the prosecution, triggering further investigation before the prosecution could tender such rebuttal evidence, once available. C

It is for the above reasons, inter alia, the IO is called as the last prosecution witness in sequence to prove a prima facie case against an accused; D

[22] Hence, in the interest of justice, further investigation could be pursued in order to suit exigencies of the case prosecuted, as the presumption of innocence favors the accused throughout the trial until he is proven and found guilty by the court. In all probabilities, the further investigation which had been pursued and completed, may favor the accused rendering the charge against him to be withdrawn. Such is also the ratio decidendi of earlier decided cases by our apex court, forming corpus of our criminal jurisprudence, like the case of *Ng Yiu Kwok and Ors v Public Prosecutor* [1989] 3 MLJ 166; *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 68. Those salient authorities support the basis that where further investigation was embarked on after charge had been preferred against an accused, the issue of illegality of the evidence procured does not arise, as it was carried out to suit the exigencies of a case, which had unfolded after trial of the case had commenced. Flowing from that, to charge an accused first and to continue with further investigation is not an affront to the administration of criminal justice, as it could be done to suit the needs of the case involving the accused and the court when confronted with that issue is not concerned with when and how evidence was obtained but only with its admissibility. The ultimate issue is, if the prosecution is able to successfully prove the charges preferred against the accused, and it is then left to court to decide based on the sufficiency of evidence tendered (see also the case of *Tan Hoo Eng v Public Prosecutor* [2019] 6 MLJ 471 (CA)). Unfortunately, those leading authorities were not referred to, followed or distinguished in the case of *Vigney Alfred Raj*. In sync, is also the majority judgment by Her Ladyship Zabariah Mohd Yusof FCJ in the same case, wherein after having referred to binding precedents, it was decided in no uncertain terms that s 254(3) of the CPC does not fetter the discretion of the court in directing that the discharge amount to an acquittal (DAA), if circumstances warrant it and the prevailing circumstance in that case being, E F G H I

after further investigation, the prosecution had deemed it fit not to prosecute the accused further.

[23] Research would have also revealed that even if an order of DAA is handed down by the court albeit an order of DNAA sought by the prosecution, an accused could still be recharged for the same offence as the plea of *auterofois acquit* (that the accused is previously acquitted) is inapplicable, since trial of the case has not commenced, and no witness for the prosecution has been called to testify (see the Supreme Court case of *Public Prosecutor v Lee Chan Sang* [1989] 1 MLJ 224). Again, it is on the same premise, s 254A of the CPC operates, as the law entitles a criminal trial to be reinstated and to continue from where it ceased, upon discharge of an accused.

[24] In sum total, the majority judgment in the case of *Vigney Alfred Raj* which has laid down the following succinct principles of law also binds this court. The principles being:

(a) the default position under s 254(3) of the CPC is for the court to direct the accused to be discharged not amounting to an acquittal ('DNAA'), if the prosecution chooses not to proceed with the case against the accused any further pursuant to s 254(2) of the CPC, like in the present case or even under s 254(1) of the CPC;

(b) s 254(3) of the CPC is clear and unambiguous, thus it cannot be interpreted with fanciful absurdity to suit a decision which is unjustifiable in law;

(c) however, an accused person could be discharged amounting to an acquittal ('DAA') if the circumstances of the case warrant so, after having considered the position taken by the PP in the case, whether to proceed with the case involving the accused later;

(d) withdrawal of charge against an accused pending completion of further investigation does not *ipso facto* justify an order of DAA from the court, as art 145(3) of our supreme law allows the PP to institute criminal prosecution upon completion of further investigation to suit exigencies of the case involving the accused; and

(e) the court is not in a position to rule repugnant to the rule of law enshrined in art 145(3) of the FC, but has to exercise its discretion when ordering a DNAA or DAA judiciously, after having considered the facts, circumstances of the case in its entirety, especially so the reason afforded by the prosecution when applying to withdraw the charge against the accused.

[25] Hence, in a nutshell, the PP may decline to further prosecute an accused at any stage of the summary trial, like in the present case, before

delivery of judgment, and if the court is informed so, the criminal proceeding against the accused shall be stayed and he shall be discharged from the charge. The said discharge shall not amount to an acquittal unless the court so directs. A discharge not amounting to an acquittal ('DNAA') means that the accused can be recharged and tried again, as there is no final order made by the court that is contrary to the doctrine of *autrefois acquit* (see s 302(1) and (5) of the CPC). Nonetheless, the prosecution is under a salutary duty to inform the court of all matters affecting the decision materially to acquit or not to acquit. Instances may include, difficulty to trace a material witness etc. Importantly is, if the prosecution would embark on a future prosecution of the accused. When deciding to either order a DNAA or DAA, the court must engage itself by weighing both the public interest, as well as unfairness to the accused, that he may be prosecuted later, and the foremost consideration shall be unless and until good ground is revealed to the court, it would not be prudent for the accused to be left saddled with a potential prosecution for an unspecified period (by analogy see cases like *Goh Oon Keow (F) and another v Rex* [1949] 1 MLJ 35; [1948] 1 MLRH 258; *Seet Ah Ann v Public Prosecutor* [1950] 1 MLJ 293b; [1950] 1 MLRH 138; *Public Prosecutor v Suppiah Pather* (Penang Criminal Revision No 14 of 1951) (unreported); *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166). Thus, if the prosecution is unable to indicate as to when the case against the accused is able to proceed, the court may grant an order of DAA (again, by analogy see cases like *Public Prosecutor v Mohamed Said* [1984] 1 MLJ 50; *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100; *Public Prosecutor v Nasir bin Insiban* [1996] 5 MLJ 153).

[26] In the present case, the SCJ when ordering a DNAA had considered all factors raised appropriately. Thus, the order made was not improper but correct in accord with circumstance of the case. Saliently, she had declared the following:

> [9] Tiada dalam mana-mana rekod mahkamah yang menunjukkan penangguhan yang diberikan sebelum ini disebabkan oleh ketidaksediaan pihak pendakwa untuk menjalankan kes kecuali pada tarikh 4 November 2022 yang dengan jelas TPR memohon kedua-dua OKT di DNAA sementara menunggu siasatan dilakukan untuk satu kes lain, yang saya faham mempunyai kaitan dengan kes ini.
>
> [10] Tentunya dalam sebarang pertikaian yang melibatkan dua pihak, masing-masing akan membawa hujah yang akan menyokong apa yang dipohon dan mahkamah dalam melaksanakan kuasa budibicaranya harus menilai keseluruhan alasan-alasan yang dikemukakan secara subjektif demi memberi keadilan kepada kedua-dua pihak.
>
> [11] Secara spesifiknya dalam kes ini saya percaya demi memberi keadilan kepada OKT, hasil siasatan dalam kes lain yang ada kaitan dengan kes ini perlu di perolehi terlebih dahulu sebelum pendakwaan ini diteruskan. Walaupun saya akui perintah DNAA tidak memuktamatkan status pembebasan kes OKT pada masa kini tetapi

A sekiranya siasatan kes tersebut tidak memihak kepada pihak pendakwaan, pertuduhan ini tidak akan diteruskan.

[12] Dalam poin yang sama, saya percaya hak pihak pendakwa untuk mendakwa OKT tidak harus dinafikan. Demi memastikan pendakwaan terhadap OKT dapat dijalankan secara adil, pihak pendakwa harus diberi peluang untuk mendapatkan B segala bukti yang kukuh dan jelas sebelum kes ini diteruskan. Justeru permohonan supaya kes ini di DNAA terlebih dahulu adalah satu tindakan yang wajar dan sesuai bagi mengelakan pembaziran kos dan masa semua pihak.

[13] Sebagai kesimpulan, saya percaya alasan yang diberi oleh pihak pendakwa wajar diberi pertimbangan sewajarnya. Perintah DNAA ini akan memberi keadilan C kepada kedua-dua pihak terutama pada tahap ini ketidak sediaan untuk meneruskan kes ini bukan disebabkan siasatan dalam kes ini tidak lengkap tetapi kerana masih menunggu hasil siasatan dalam satu kes lain yang ada kaitan dengan kes ini. Saya percaya perintah DNAA ini telah dibuat selaras dengan kuasa budibicara mahkamah dan sama sekali tidak melanggar mana-mana peruntukan D undang-undang sedia ada.

[27] In the upshot, I am bound by the rule of law entrenched in s 254(3) of the CPC, which was also echoed in the majority judgment of the apex court in *Vigney Alfred Raj*. On that score, the application by the accused persons to have E the order of DNAA made by the SCJ revised as it is allegedly improper is dismissed. This court finds the order of DNAA made is proper in the circumstance of the case and the basis rendered by the SCJ is well founded. For the record, I am informed that the accused persons have now been recharged.

F Order of DNAA affirmed.

Order of DNAA affirmed.

Reported by K Selvaraju

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